In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 234

CARLISLE COOPER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 16-22) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1956. (Pet. 15.) The petition for a writ of certiorari was filed on July 6, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTON PRESENTED

Whether petitioner's conviction for perjury committed at a hearing conducted by agents of the Internal Revenue Service is precluded by the fact that he was not then represented by counsel.

CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

18 U. S. C.:

> Sec. 1621. *Perjury generally.*
>
> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

Administrative Procedure Act, c. 324, 60 Stat. 237:

> Sec. 6. Except as otherwise provided in this Act—
>
> (a) *Appearance.*—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.
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> * * * * *

(5 U. S. C. 1952 ed., Sec. 1005 (a).)

STATEMENT

On February 19, 1953, petitioner was indicted in the United States District Court for the Eastern District of Missouri for having knowingly committed willful and corrupt perjury in violation of 18 U. S. C. 1621. The indictment alleged in pertinent part that peti-

tioner, having been duly sworn, falsely testified (1) that the invoice price of vehicles sold by Andy Burger Motors, Inc. during the years 1945 through 1948 in each instance represented the true amount for which such vehicles were sold, and (2) that upon the sale of either used or new cars, neither petitioner nor Andy Burger Motors, Inc., had ever received any sum of money over and in addition to the invoice price of such cars. (R. 1-5.) After a jury trial lasting five days, petitioner was found guilty as charged (R. 158), and on November 10, 1955, he was sentenced to imprisonment for a period of five years (R. 164-165).[1] The Court of Appeals affirmed. (Pet. 15-22.)

The evidence to support the verdict may be summarized as follows:

Having been in the automobile business since 1933, petitioner started to work for one Andy Burger in the fall of 1940. In August, 1945, petitioner was made general manager in charge of Andy Burger Motors, Inc., and he continued to hold this position during the years 1945, 1946, 1947 and 1948. Part of petitioner's responsibilities as general manager was to determine the sales prices of new and used cars. (R. 43, 53.)

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[1] Bail pending appeal was denied by the district judge. (R. 170.) After oral argument, the Court of Appeals for the Eighth Circuit, on November 16, 1955, also denied bail. (Application for Admission to Bail, p. 4.) Application was then made to Mr. Justice Clark, as the Circuit Justice for that circuit. In opposition thereto the Government filed a memorandum contending that no substantial questions were involved on appeal. On December 22, 1955, Mr. Justice Clark denied the application. A renewed application for bail pending appeal was then addressed to the full Court, which denied it on January 30, 1956. *Cooper* v. *United States*, 350 U. S. 957.

During the years 1945 through 1948, petitioner sold several hundred automobiles to Elbert Montgomery and Jude Montgomery, who did business under the partnership name of Montgomery Motor Sales. At petitioner's request, the Montgomerys paid for each of these automobiles partially by check and the remainder by cash. They received from petitioner invoices which reflected only the amounts paid by check. Petitioner told them that he did not want the additional cash prices to appear on the Montgomery Motor Sales books, but that he did want their records to be just like his. During the four years involved, the Montgomery brothers paid cash exceeding the invoice price in the average amount of $200 to $250 per car and in the total amount of approximately $100,000. (R. 75-77, 83-84.)

During the same period petitioner also sold automobiles to Walter Pfaff of Nesser Motors. Petitioner exacted additional cash sums over and above the check and invoice amounts, directed that the Nesser Motors books show the amount of the checks and not reflect currency payments, and stopped occasionally at Pfaff's office to see how the records were being kept. After OPA regulations were removed from automobiles, Pfaff told petitioner that he could not buy any more cars if he had to pay cash over the invoice price for them. Petitioner told Pfaff that it had to be that way or Pfaff could not buy any more cars. (R. 91-92.)

In 1947, petitioner sold nine automobiles to various individual purchasers and exacted cash payments ranging from $165 to $300 above invoice prices. (R.

73-74, 100-101, 103, 104, 107-108, 108-109, 110-111, 114-115, 118-119, 120, 121-122, 123.)

In May, 1949, Special Agent Robert M. Fendorf commenced investigating petitioner's income tax returns along with those of Andy Burger and Andy Burger Motors, Inc. On July 1, 1952, he held an interview with petitioner relative to the investigation. Petitioner appeared voluntarily. (Q. & A. 191-193; Ex. 1-B; R. 37, 62; *infra*, p. 8.) Internal Revenue Agent John F. Corkery and a stenographer were also present. Fendorf administered the oath to petitioner. When questioned, petitioner repeatedly denied receiving money in excess of the invoice prices and stated that all transactions were by check and that no cash was involved. Six weeks later, petitioner reviewed the reporter's transcript of the interview, initialed each page, and certified that it was correct. (Q. & A. 59, 84, 85, 87-91, 103-106, 115, 116, 135-142, 148-150, 161-162, 169, 196, 200; Ex. 1-A, 1-B; R. 28, 29, 30, 37, 38-66, 72-73.)

At the trial the Government established the matters indicated above. Petitioner took the witness stand and testified that he did not wish to change any of his testimony appearing in the reporter's transcript of the interview. (R. 135.) When cross-examined regarding the Government witnesses' testimony contrary to his, petitioner's explanation was that they were mistaken. (R. 140.)

ARGUMENT

While acknowledging (Pet. 5) that the agents conducting the interview advised him of his right under the Fifth Amendment to refrain from answering any question which he thought might incriminate him, petitioner contends (Pet. 7-9) that under the Sixth Amendment (*supra*, p. 2) he had the right to have counsel present at this interview and, more specifically, that the agents were under an affirmative duty to advise him of this right to have counsel present.

This contention is without merit. In the first place, it has long been decided that the rights provided for by the Sixth Amendment accrue only after a criminal prosecution has begun, *Counselman* v. *Hitchcock*, 142 U.S. 547, 563, and this rule has been specifically applied to the right to counsel *Gilmore* v. *United States*, 129 F. 2d 199, 203 (C. A. 10th), certiorari denied, 317 U. S. 631. Cf. *Hanson* v. *United States*, 186 F. 2d 61, 65 (C. A. 8th), as to the privilege against self-incrimination.

Petitioner also maintains (Pet. 9-12) that, if there is no constitutional right to counsel, such a right was accorded him by Congress in the Administrative Procedure Act of 1946, c. 324, 60 Stat. 237, particularly Section 6 (*supra*, p. 3) which provides that any person *compelled* to appear before any agency has the right to counsel. Assuming the Administrative Procedure Act to be applicable to tax investigations authorized by Section 3614 (a) of the Internal Reve-

nue Code of 1939,[2] petitioner's interview plainly did not fall within its purview, since he was not compelled to appear but came of his own free will. The record makes this clear (Ex. 1-B; R. 37, 62):

> Q. 191. Has your appearance here today been voluntary on your part?
>
> A. 191. It has.
>
> Q. 192. Were you compelled to appear for this interview?
>
> A. 192. I was asked to appear for it.
>
> Q. 193. And you came of your own free will and accord?
>
> A. 193. I certainly did.

Moreover, petitioner was in no sense *refused* the right to counsel; nor did he seek to avail himself of any such right. He cites no authority and we have found none holding that a person entitled to a statutory right to counsel, at an interview or "inquiry" such as this, must be informed of it or else the proceeding is entirely vitiated. Petitioner's reliance (Pet. 7-8, 10) on *Johnson* v. *Zerbst*, 304 U. S. 458, *Walker* v. *Johnston*, 312 U. S. 275, and *Wood* v. *United States*, 128 F. 2d 265 (C.A. D.C.) is misplaced. Those cases each involved a criminal proceeding at which the accused was required to appear.

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[2] Though it need not be decided in the present case, there is a question whether the tax investigations authorized by Section 3614(a) of the Internal Revenue Code of 1939, which are wholly factfinding in nature and in which no legal rights of parties are determined, are "agency proceeding[s]" within the meaning of the Administrative Procedure Act. See Section 2(g), Administrative Procedure Act, c. 324, 60 Stat. 237 (5 U.S.C. 1952 ed., Sec. 1001(g)). Cf. *Torras* v. *Stradley*, 103 F. Supp. 737, 739 (N. D. Ga.)

CONCLUSION

No question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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